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13 **PACIFICA FOUNDATION, et al.**

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 THE PEOPLE OF THE STATE OF)
17 CALIFORNIA, ex rel. CAROL SPOONER,)
18 KURT GUERDRUM, ARTURO GRIFFITHS,)
19 AMBURN R. HAGUE, LEIGH HAUTER,)
20 PATRICIA HEFFLEY, BARBARA)
21 MacQUIDDY, RICK POTHOFF, CHARLES)
22 P.H. SCURICH, RONALD SWART,)
23 individually and on behalf of PACIFICA)
24 FOUNDATION,)

25 Plaintiffs,)

26 vs.)

27 PACIFICA FOUNDATION, a California non-)
28 profit public benefit corporation and charitable)
trust, MARY FRANCES BERRY, JUNE)
MAKELA, FRANK MILLSPAUGH, ANDREA)
CISCO, KEN FORD, ROB ROBINSON,)
DAVID ACOSTA, MICHAEL PALMER,)
ROBERT FARRELL, AARON KRIEGEL,)
PETER BRAMSON, KAROLYN VAN)
PUTTEN, TOMAS MORAN, WENDELL)
JOHNS, LESLIE CAGAN, VALRIE)
CHAMBERS, BERTRAM LEE, BETH)
LYONS, JOHN MURDOCK, LYNN)
CHADWICK, and DOES 1-100, inclusive,)

Defendants.)

Case No. C 00 3815 WHA

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
FOUNDATION'S MOTION TO
DISMISS**

Date: November 30, 2000

Time: 8:00 a.m.

Dept: 9

Judge: Hon. William H. Alsup

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1 **I. INTRODUCTION¹**

2 Plaintiffs in this case are a group of self-selected disgruntled listeners of five radio
3 stations² who crave the opportunity to control the content of the airwaves assigned to those
4 stations by the Federal Communications Commission ("FCC"). The exclusive authority to
5 control that content, however, belongs to the licensee designated by the FCC. That licensee is
6 the Pacifica Foundation ("Foundation").

7 Plaintiffs dislike the changes that the Foundation, acting through its Board of Directors,
8 has made and proposes to make in its stations' programming and administration. They seek to
9 have the Court order changes to the Foundation's decisions, and to give plaintiffs authority they
10 do not now possess with respect to determinations regarding future programming. While
11 plaintiffs attempt to disguise their claims as involving state law issues, that is merely a façade.
12 The undeniable essence of plaintiffs' claim is that they object to the programming and
13 administrative decisions of the Foundation. As a result, plaintiffs' claims and requests for relief
14 tread squarely on ground reserved exclusively for the FCC and CPB and are therefore preempted.

15 Plaintiffs also lack standing to bring this suit because, after receiving permission from the
16 Attorney General to proceed as relators, they made very substantial changes to the complaint
17 approved by the Attorney General. This is a clear and direct violation of applicable law. Cal.
18 Code Regs. tit. 11, §§1-2.

19 Plaintiffs' claims against the Directors of the Foundation must be dismissed for two
20 additional compelling reasons. First, the conduct alleged as the basis of plaintiffs' claims falls
21 within the protection of the business judgment rule. Second, under California law, plaintiffs are
22 first required file a verified petition with a court seeking leave to proceed against directors of a

23 ¹ This Memorandum is filed in support of the Motion to Dismiss filed on behalf of the following
24 defendants: Pacifica Foundation, Mary Frances Berry, June Makela, Frank Millsbaugh, Andrea
25 Cisco, Ken Ford, David Acosta, Michael Palmer, Karolyn Van Putten, Wendell Jones, Valrie
26 Chambers, Bertram Lee, Beth Lyons, John Murdock, Robert Farrell, and Lynn Chadwick
(hereafter the "Foundation Defendants"). The Foundation Defendants have filed a motion
seeking the realignment of defendants Robinson, Kriegel, Bramson, Moran, and Cagan as
plaintiffs.

27 ² KPFW (Washington, DC), KPFA (Berkeley), KPFT (Houston), KPFK (Los Angeles) and
28 WBAI (New York).

1 non-profit entity prior to filing suit against such directors. Plaintiffs did not do so. Cal. Code
2 Civ. Proc. §425.15.

3 The claim for an accounting must be dismissed for two separate reasons. First, only the
4 “members” and “directors” of a corporation, as defined by statute, have standing to seek an
5 accounting. Plaintiffs, in their capacities as either “listener-sponsors” or “relators” fall into
6 neither of these categories. Second, under applicable law, a plaintiff must first make a demand
7 on the corporation for an accounting before he or she has the standing to file suit for an
8 accounting.³ Plaintiffs do not allege that they ever made such a demand on the Foundation.

9 Plaintiffs also assert several claims for “usurpation of office.”⁴ This cause of action,
10 however, applies only to government officials, not to directors or officers of private nonprofit
11 corporations such as Foundation. Therefore, these claims must be dismissed.

12 Plaintiffs’ claims must also be dismissed to the extent that they seek to have this Court
13 grant to community public radio “listener-sponsors” any authoritative or substantive power in the
14 selection, by any means, of the representatives either to a station’s Local Advisory Board
15 (“LAB”), or to the Foundation’s Board. There is simply no basis in law for this relief. A
16 listener’s decision to make a charitable donation to the Foundation, while laudable and
17 appreciated, confers no legal right on the listener to have any authority or control over the
18 operation or program content of any of the Foundation’s five stations.

19 **II. THE STANDARD FOR A MOTION TO DISMISS**

20 The Complaint must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil
21 Procedure (“Rule 12(b)(6)”) because it fails to state a claim on which relief may be granted.
22 Under Rule 12(b)(6), a claim should be dismissed if, after accepting all well-pleaded allegations
23 as true, and drawing all reasonable factual inferences the plaintiffs’ favor, the plaintiffs can prove
24 no set of facts alleged in the complaint that would entitle them to relief. *Warshaw v. Xoma*
25 *Corp.*, 74 F.3d 955, 957 (9th Cir. 1996); *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir.

26 _____
27 ³ Cal. Corp. Code §6333.

28 ⁴ Compl., Fifth Cause of Action, 62-65.

1 1997) (a complaint should not be dismissed unless it appears beyond a reasonable doubt that
2 plaintiffs can prove no set of facts in support of their claim that would entitle them to relief);
3 *Oscar v. University Students Co-op. Assoc.*, 965 F.2d 783, 785 (9th Cir. 1992); *Enesco Corp. v.*
4 *Price/Costco Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998).

5 While the Court must accept all material allegations in a complaint as true, the Court need
6 not accept legal conclusions, couched as factual allegations, as if they were true. *National Ass'n*
7 *for Advancement of Psychoanalysis v. California Bd. of Psychology*, No. 99-15243, 2000 WL
8 1434626, *3 (9th Cir. Sept. 29, 2000) (conclusory allegations of law and unwarranted inferences
9 are insufficient to defeat motion to dismiss for failure to state a claim); *Associated Gen.*
10 *Contractors of America v. Metropolitan Water Dist. of S. California*, 159 F.3d 1178 (9th Cir.
11 1998).

12 Indeed, it is proper for a court to go outside the complaint and consider other materials
13 and documents in evaluating a motion to dismiss under Rule 12(b)(6). *Cooper v. Pickett*, 137
14 F.3d 616 (9th Cir. 1997); *Fecht v. The Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995); *In re*
15 *Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996); *Branch v. Tunnell*, 14 F.3d 449,
16 453 (9th Cir. 1994) (“a document is not ‘outside’ the complaint if the complaint specifically
17 refers to the document and if its authenticity is not questioned”); *Emrich v. Touche Ross & Co.*,
18 846 F.2d 1190, 1198 (9th Cir. 1988) (on a motion to dismiss, court may take judicial notice of
19 documents which are “a matter of general public record”); *Mishler v. Clift*, 191 F.3d 998 (9th Cir.
20 1999); *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

21 **III. THE PLAINTIFFS’ CLAIMS ARE PREEMPTED BY FEDERAL LAW.**

22 **A. Plaintiffs Seek to Change the Substance and Style of the Programming Aired** 23 **by the Foundation’s Stations and to Thereby Achieve De Facto Control of the** 24 **Foundation’s Broadcast Licenses.**

25 While plaintiffs’ claims are styled as state law causes of action, their actual agenda is to
26 achieve control of the programming of the Foundation stations and to seize control of the stations
27 and their broadcast licenses. (See, e.g., Compl., ¶¶1-4, 19-22, 43; Prayer For Relief, ¶¶1-8, 11-
28 16). Such matters and purposes, however, are exclusively subject to federal regulations and,
moreover, fall within the jurisdiction of the FCC as to program content issues, and the

